IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No.11469 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE D.A.MEHTA Sd/-
and
HON'BLE MS.JUSTICE H.N.DEVANI Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

POLY FILL SACKS

Versus

UNION OF INDIA

Appearance:

1. Special Civil Application No. 11469 of 2004
MR DHAVAL SHAH for Petitioner No. 1
MR JITENDRA MALKAN for Respondent No. 1
DS AFF.NOT FILED (N) for Respondent No. 2-4

CORAM : HON'BLE MR.JUSTICE D.A.MEHTA
and
HON'BLE MS.JUSTICE H.N.DEVANI

Date of decision: 18/02/2005

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE D.A.MEHTA)

1. RULE. Mr.Jitendra Malkan, learned Senior Standing Counsel, waives service of rule on behalf of respondent Nos.1, 2 and 3. By consent of the respective parties, for the reasons that follow hereinafter, the matter is taken up for hearing and final disposal.

2. The facts lie in a very narrow compass. The petitioner has moved this Court under Article 226 of the Constitution of India seeking a writ of mandamus for quashing the order of attachment of goods dated 6th September 2004 and action of respondent No.3 of invoking and encashing Bank Guarantee No.24/4. A further consequential relief seeking restitution of the position as prevailing before the encashment is also sought. The petitioner had preferred an appeal in accordance with provisions of the Central Excise Act, 1944 (the Act) before the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) accompanied by an application for stay of demand. After hearing the parties on 21st May, 1996 an order came to be made by the CESTAT : for the purpose of securing the interest of revenue the appellant was directed to furnish a Bank Guarantee in the sum of Rs.1,00,000/- (Rupees One lac only) within a period of two months and report compliance on 12th August, 1996. It is an admitted position that since then the Bank Guarantee, furnished by the petitioner, has been extended from time to time and lastly on 29th March, 2004, respondent No.4 had informed respondent No.2 that the Bank Guarantee had been extended upto 6th July, 2005.

3. The grievance of the petitioner is that despite the order made by the CESTAT staying recovery of duty and penalty amount, an order of attachment (Annexure-D) came to be made on 6th September 2004. This order was followed by invoking and encashment of Bank Guarantee No.24/4 for a sum of Rs.1,00,000/- (Rupees One lac only) vide another order dated 6th September 2004.

4. Mr.Dhaval Shah, learned advocate for the petitioner, has stated that reliance placed by the respondents on amended provisions of Section 35C(2A) of the Act with special reference to the Second Proviso is unwarranted and the impugned action is bad in law. According to Mr.Shah, the order staying the recovery having been made prior to 11th May, 2002, the period of 180 days mentioned in the Second Proviso cannot be made applicable to such an order and the provision operates prospectively. In support, reliance has been placed on an order dated 13th January 2005 made by the Hon'ble

Supreme Court of India in S.L.P. No.13792 of 2003 (in case of Commissioner of Customs & Central Excise, Ahmedabad Vs. M/s. Kumar Cotton Mills (P) Ltd. & Anr.) and cognate matters to point out that the decision in case of Kumar Cotton Mills Pvt. Ltd. Vs. Commissioner of Customs & Central Excise, Ahmedabad-I, 2002 (146) E.L.T. 438 (Tribunal Mumbai) stands approved.

5. Mr.Malkan, learned Senior Standing Counsel appearing on behalf of the respondent - department, submitted that it was bounden duty of the petitioner to seek extension of stay from the Tribunal once a statutory provision had been incorporated and the petitioner having failed to do so, the respondent authorities were well within their rights in initiating action for recovery of outstanding dues because on expiry of the statutory period prescribed in Second Proviso to Section 35C(2A) of the Act the stay granted by the CESTAT would stand vacated automatically. Mr.Malkan also invited attention to a sentence from the aforesaid order of the Hon'ble Apex Court to contend that the order of the Apex Court should not be understood as giving any latitude to the Tribunal to extend the stay except on good cause. He, therefore, urged that it was not necessary to entertain the petition and the same should be rejected.

6. Section 35C of the Act deals with the Orders of the Tribunal and sub-section 2A has been inserted w.e.f. 11-05-2002 and reads as under:

> "[(2A) The Appellate Tribunal shall, where it is possible to do so, hear and decide every appeal within a period of three years from the date on which such appeal is filed :
>
> Provided that where an order of stay is made in any proceeding relating to an appeal filed under sub-section (1) of section 35B, the Appellate Tribunal shall dispose of the appeal within a period of one hundred and eighty days from the date of such order :
>
> Provided further that if such appeal is not disposed of within the period specified in the first proviso, the stay order shall, on the expiry of that period, stand vacated.]"

On a plain reading of the provision it becomes apparent that where an order of stay is made in any proceeding relating to an appeal, the Tribunal is required to dispose of the appeal within a period of 180 days from

the date of such an order granting stay of recovery and under the Second Proviso it is laid down that in case such appeal is not disposed of within the period specified in the First Proviso, on the expiry of the said period, the stay order shall stand vacated. The main provision states that the appellate Tribunal shall, where it is possible to do so hear and decide every appeal within a period of three years from the date of filing.

7. Thus, the scheme is that an appeal is required to be disposed of within a period of three years from the date of filing, but where stay is granted by the Tribunal, the said period of three years stands curtailed to 180 days from the date of the order granting stay. Though, the language employed by the statute appears to be mandatory in terms, considering the object behind the provision it has to be understood to mean as being directory in nature. In other words, disposal of appeal has to be within the specified period, three years or 180 days, where it is possible to do so. What meaning does one ascribe to the phrase "where it is possible to do so", if the contention of Revenue is required to be upheld. If Second Proviso is read in isolation the interpretation canvassed by Revenue may appear to be correct. But one cannot loose sight of the legal position : a proviso carves out an exception to the main rule. This Court in the case of Indo-Nippon Chemicals Co. Ltd. & Anr. Vs. Union of India & Ors., 2002 (49) RLT 642 (Guj.) has laid down :

> "..... The normal function of a proviso is to except something out of the enactment or to qualify something enacted therein which, but for the proviso, would be within the purview of the enactment. To this real nature of proviso is also another principle of interpretation that the proper function of a proviso is that it qualifies the generality of the main enactment by providing an exception. Ordinarily, it is foreign to the proper function of proviso to read it as providing something by way of an addendum or dealing with a subject which is foreign to the main enactment. Proviso can be taken aid of as useful guide to construction of the main enactment. If the enacting portion of a Section is not clear a proviso appended to it may give an indication as to its true meaning. As stated by Lord Herschel, 'of course, a proviso may be used to guide you in the selection of one or other of two possible constructions of the words to be found in the enactment, and show when there is doubt about its scope, when it may reasonably

admit of doubt as to having this scope or that, which is the proper view to take of it'. Mudholkar, J. in Hindustan Ideal Insurance Co. Ltd. vs. Life Insurance Corporation Ltd. reported in AIR 1963 SC 1087 stated the rule thus - 'there is no doubt that where the main provision is clear, its effect cannot be cut down by the proviso. But where it is not clear, the proviso, which cannot be presumed to be a surplus age, can properly be looked into to ascertain the meaning and scope of the main provision." Since the natural presumption is that but for the proviso, the enacting part of the Section would have included the subject matter of the proviso, the enacting part should be generally given such a construction which would make the exceptions carved out by the proviso necessary and the construction which would make the exceptions unnecessary and redundant should be avoided (See Principles of Statutory Interpretation by Justice G.P.Singh, Eighth Edition, 2001, pages 168, 169, 174, 175 and 176)."

8. When legislature has provided in the main provision, i.e. sub-section (2A) of Section 35C of the Act, that CESTAT may hear and decide the appeal within a period of three years, where it is possible to so, legislature is well aware of the administrative exigencies and difficulties of the said body. There could be a host of reasons ranging from non-availability of a bench due to non-appointment of adequate number of technical and/or judicial members at a particular station to the quantum and quality of appeals at a particular station. One cannot and should not even attempt to exhaustively list these. Suffice it to state - the discretion available to CESTAT under Section 35C (2A) of the Act does not stand obliterated by insertion of the two provisos, and more particularly by the Second Proviso.

9. The matter may be considered from a slightly different angle. Section 35C(1) of the Act empowers CESTAT to pass such orders, on an appeal before it, as CESTAT thinks fit. The said provision confers on CESTAT powers of the widest amplitude in dealing with appeals before it, grants by implication the power of doing all such acts, or employing such means, as are essentially necessary to its execution. The statutory power under the said section carries with it a duty in proper cases to make such orders for staying recovery of demand of duty, etc. pending an appeal before the Tribunal, as

will prevent such an appeal, if successful, from being rendered nugatory. Sub-section (2A) of the Act was brought on statute book to ensure disposal of pending appeals within a reasonable time frame and curtail delays. But from this it is not possible to infer a legislative intent to curtail/withdraw powers of the Tribunal to grant stay in appropriate cases. It is also not possible to infer any curtailment of such powers beyond the period of six months. The legislature would have specifically provided so if it was so intended. Any other interpretation of the sub-section with both the provisos would frustrate the object of Tribunal dispensing justice in deserving cases where the assessee is not at fault in any manner : the assessee having filed appeal and stay application within period of limitation, prima facie proved his case at hearing and obtained stay with or without conditions, and co-operating with Tribunal for hearing and disposal of appeal : but, the Tribunal is not in a position to proceed for various reasons.

10. The contention on behalf of Revenue that the assessee must approach the Tribunal and seek extension of stay already granted is misconceived - atleast in relation to orders of the Tribunal made before 11-05-2002. Firstly, it proceeds on a fallacious premise as stated hereinbefore. Secondly, in absence of any change in circumstances why should the Tribunal be inundated with extension applications when admittedly, it is already overburdened and reeling under backlog of pending appeals.

11. However, in cases where the Revenue finds that a particular assessee having obtained stay is adopting dilatory tactics, it is always open to Revenue to move the Tribunal in such an eventuality.

12. For the period subsequent to the insertion of the Second Proviso the Tribunal should, as a matter of practice, specify the time period during which the stay shall operate after exercising its judicial discretion. The period may be limited or could be co-terminous with disposal of appeal -- on consideration of all relevant factors in a given fact situation.

13. Therefore, as held by the Apex Court in case of Commissioner of Customs & Central Excise, Ahmedabad Vs. M/s. Kumar Cotton Mills (P) Ltd. (supra) an assessee cannot be punished for matters which may be completely beyond the control of the assessee. The situations set out by the Apex Court in its order are only illustrative and not exhaustive. The object of the provision is

expressed by the Apex Court to be for the purpose of curbing the dilatory tactics of assesses, who having obtained an interim order in their favour, seek to continue the interim order while delaying the disposal of the proceedings. The observations i.e. the last sentence on which reliance has been placed by the learned Senior Standing Counsel regarding latitude being given to the Tribunal are relatable only in the situation where extension of period of stay is sought.

14. In the facts of the present case, it is not even the case of the respondents that the petitioner was not ready and willing to proceed with the hearing of the appeal. The entire case is built only on interpretation of the provision being mandatory permitting the authorities to initiate action once period of 180 days expired from the date of the order granting stay. As stated hereinbefore, such an interpretation is against the plain language of the provision and does not flow from the provision. Such an interpretation is also against the object with which the said provision has been incorporated in the statute. It is necessary to take note of the fact that the decision of the Tribunal on which reliance has been placed as well as subsequent decision of Larger Bench of the Tribunal have been approved by the Hon'ble Apex Court in no uncertain terms.

15. In the result, the petition is allowed. The respondent authorities are directed to lift the order of attachment dated 6th September, 2004 and this shall be done forthwith, without waiting for a certified copy of judgment and order of this Court.

The action of respondent No.3 in invoking and encashing Bank Guarantee No.24/4 is bad in law and is hereby quashed and set aside. The respondent authorities are directed to re-deposit the amount of Rs.1,00,000/(Rupees One lac only) with respondent No.4 Bank within a period of 03 (three) weeks from today so as to enable respondent No.4 to revive the Bank Guarantee in favour of the Commissioner of Central Excise & Customs, Vadodara-I.

16. Rule is made absolute to the aforesaid extent. There shall be no order as to costs.

17. At this stage, Mr.Malkan, learned Senior Standing Counsel, prays for staying the aforesaid order for a period of 04 (four) weeks. In light of the fact that the issue stands concluded by an order of the Hon'ble Supreme Court of India, the request is rejected.

Sd/- Sd/-

[D.A.MEHTA,J] [H.N.DEVANI,J]

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'Bhavesh'